

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNION PACIFIC RAILROAD
COMPANY,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, and
LISA P. JACKSON, ADMINISTRATOR,
in her official capacity,

Defendants.

CASE NO. 8:10CV235

**PROPOSED PLAINTIFF-
INTERVENOR ASARCO LLC'S
MOTION TO INTERVENE**

Pursuant to the Federal Rules of Civil Procedure, Rule 24(a) and 24(b), by and through their undersigned attorneys, Asarco LLC hereby moves to intervene as a Plaintiff-Intervenor in the above-captioned action. Asarco seeks to intervene to protect its rights in the property at issue in this action, documents that are crucial to a determination of Asarco's ultimate financial liability for cleanup costs at the so-called Omaha Lead Site ("OLS"), a National Priorities List ("NPL") or "Superfund" site, and Asarco's ability to obtain reimbursement for its expenditures of over \$200 million on remedial measures at the site.

Union Pacific Railroad Company (“UP”) originally filed this action on June 23, 2010, in order to preserve information relevant to UP’s contention that it should not be held liable for any of the OLS remedial costs, after UP discovered that EPA was systematically destroying documents that could determine UP’s and other parties’ liability for cleanup costs at the site. EPA contends that Asarco, UP, and other entities are Potentially Responsible Parties (“PRPs”) at OLS, asserting that these parties are responsible for contamination at the site and therefore financially liable for its cleanup. UP disputes EPA’s claim that UP is responsible for any contamination at the site. UP therefore seeks to preserve and obtain those documents in EPA’s possession that are exculpatory for UP, *i.e.*, documents that support UP’s contention that it should not be held responsible for any costs at OLS.

Asarco also has a vital interest in the documents in question, but this interest is distinct from UP’s. Asarco, like UP, previously filed FOIA requests with EPA, to which the destroyed documents almost certainly would have been responsive. Indeed, ASARCO’s FOIA request included documents and information about recontamination also requested by UP in UP’s April 6, 2009 FOIA request. Preservation and recovery of these documents is important to Asarco’s response cost reimbursement efforts. UP and Asarco are potentially adverse in the question of financial liability for the site, and because this question may well be determined by EPA documents that will ultimately either be preserved and disclosed or withheld and destroyed in the resolution of UP’s action, UP does not adequately represent Asarco’s interest in those documents.

Asarco therefore requests that the Court grant Asarco’s Motion to Intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure and accept the accompanying

Intervenor's Proposed Complaint in UP's action to preserve documents. Asarco seeks to intervene as a plaintiff-intervenor as of right under Fed.R.Civ.P. 24(a)(2), or, in the alternative, as a permissive intervenor under Fed.R.Civ.P. 24(b)(1). A Brief in Support thereof and Memorandum of Points and Authorities accompanies this Motion, along with the proposed Asarco's Complaint of Plaintiff-Intervenor attached hereto as Exhibit "1".

Respectfully submitted this the 18th day of October 2010.

By:

/s/ David A. Blagg

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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